No. 82-1819

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

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EDWARD WILLIAM ARDT,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondents.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Whether the Petitioner was denied a fair trial in a case where he had been forced into bankruptcy and was an indigent and the trial court denied him compulsory process to obtain witnesses at the court's expense so that Petitioner could invoke his Fifth Amendment (United States Constitution) privilege against self-incrimination in defense to prosecution under *Title 26, United States Code, Section 7203,* for failure to file a tax return for certain years.

2. Where Petitioner is prosecuted for failure to file an income tax return, can the trial judge deny the defendant a right to a judicial hearing on his right to invoke his Fifth Amendment, (U.S. Constitution) privilege not to incriminate himself; and where the judge holds, as a matter of law, the return, as filed by the Petitioner, null and void; and where the judge refuses to place the matter of Petitioner's invocation of his Fifth Amendment privilege before the jury under proper instruction to pass upon this question of fact—is such procedure a violation of due process of law under Amendments Five and Six, (U.S. Constitution).

## PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of the parties.

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*To the Honorable Chief Justice and Associate Justices of the United States:*

Petitioner, Edward W. Ardt, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 8, 1983 (See Appendix B), denying Petition for Hearing En Banc, affirming the judgment of the District Court of the United States for the Northern District of Illinois, Eastern Division.

## OPINIONS BELOW

The U.S. Court of Appeals, Seventh Circuit, failed to write an Opinion and only issued an Order in the instant appeal. Petitioner's argument can only be addressed to that Order, (See Appendix A), in view of the fact that no Opinion was issued by this Court of Appeals, and was not reported pursuant to Circuit Court Rule 35 (U.S. Court of Appeals, 7th Cir., Rule 35) and remains unpublished, not to be cited.

## JURISDICTIONAL STATEMENT

Edward William Ardt, Petitioner, was convicted after a jury trial on November 12, 1981, and sentence (See Appendix C) was pronounced on January 19, 1982, on three counts for failure to file income tax returns under *Title 26 U.S. Code* Section 7203 for 1974, 1975, and 1976. Petitioner's sentence included a one year jail sentence on count One of the indictment for failure to file a tax return in 1974. On count Two, Petitioner was ordered to pay a fine of $10,000, and the imposition of sentence as to imprisonment was suspended, and Petitioner was placed on probation for five years for failure to file in 1975. Sentence on count Three of the information was suspended, and Petitioner was placed on probation for a period of five years—such period of probation to be consecutive to the term of imprisonment imposed on count one and concurrent to the probation on count two.

The United States Court of Appeals, Seventh Judicial Circuit, affirmed the Trial Court's judgment under date of December 1, 1982. (See Appendix A)

Motion for rehearing or hearing En Banc was filed on December 16, 1982, in Seventh Circuit Court of Appeals and was denied under date of March 8, 1983, and this Petition was timely filed within 60 days of that date. (See Appendix B).

Statutory provision which gives the United States Supreme Court jurisdiction over certiorari is *Title 28 U.S. Code* Section 1254.(1).

## STATEMENT OF THE CASE

The trial court in this case conducted only the semblance of a jury trial. The trial court in defiance of the holding in *U.S.* v. *Murdock*, 290 US 389, directed the jury to convict the Petitioner. The trial court had deprived him of his *Sixth Amendment* (U.S. Constitution, Amendment Six) Right to access to witnesses and to his *bankruptcy file in Franklin County, Ohio (infra)*. Further, in this *Title 26 USC* 7203 prosecution for failure to file a tax return, the trial court wrongfully instructed the jury as to the meaning of the term "willfully". The Petitioner was charged with not filing tax returns in the years 1974, 1975, and 1976. Petitioner's bankruptcy was pending in the years 1972 through 1976. The trial court, in violation of the Petitioner's *Sixth Amendment* (U.S. Constitution, Amendment Six) Right, deprived him of the right to subpoena those files and of the right to place them in evidence, although such evidence related to petitioner's Fifth Amendment assertions.

Petitioner did not have a duty, and the District Court had no jurisdiction to try the Petitioner for failure to file tax returns for the years 1972 through 1976, because the Bankruptcy Court had all the Petitioner's assets in *Custodia Legis. International Bank* v. *Sherman*, 101 US 403; 25 L Ed 866; *Mueller* v. *Nugent*, 184 US 1; 46 L Ed 405. The duty to file a tax return is on the Trustee. 9 Am Jur 2nd p 711, Section 434, Bankruptcy.

Under these decisions it is clear that the filing of a Petition in Bankruptcy is a *CAVEAT* to all the world, and, in effect, an attachment and an injunction as to all property of the Bankrupt until the bankruptcy is closed.

The Seventh Circuit Court of Appeals not only failed to correct the obvious flagrant errors of the trial court, but in line 4 of the Order, dated December 1, 1982 (See Appendix A), as entered (no Opinion was filed), manifested its bias and called the Petitioner a "tax protester" (See Appendix A), thereby violating his *First Amendment* Right to free speech (U.S. Constitution, Amendment One). That court then proceeded in

an unprecedented attempt to excuse the trial court's flagrant violation of the Petitioner's right to due process of law, constitutional fair trial.

The Seventh Circuit Court of Appeals claimed that it was not necessary to write an Opinion for the Petitioner in this case. The Court referred to the case of *U.S.* v. *Verkuilen,* 690 Fed 2d 648 as its reason. That was a decision where the Defendant was an employee, and the law controlling it resulted from a different statute and the use of W-4 forms by the Defendant. In this case, Petitioner is being tried under 26 USC 7203 as an employer. Petitioner contends the case is in direct conflict with the Second Circuit case of *U.S.* v. *Schiff,* 612 F2d 73.

In addition, the following are facts material to consideration of questions presented.

Under the Department of Health, Education and Welfare (HEW), the State of Ohio in 1970 owed Petitioner nearly $100,000.00 for treatment of indigent dental patients for work performed in Columbus, Ohio.

In 1970, the Welfare Department of the State of Ohio conducted an Administrative Review upon charges of fraud attributed to the Petitioner, Edward W. Ardt, a resident of Columbus, Ohio, in connection with professional services and processing of dental patients under the Welfare Program of the State of Ohio. Petitioner was not notified of these investigations and hearings, but was summarily suspended (by the Welfare Department of the State of Ohio, acting under the direction of Federal Agency personnel) from further servicing patients under the program—charging fraud, misrepresentation and misappropriation as the basis of such suspension (Trial Court Record, MOTION FOR SERVICE OF SUBPOENA AND FOR PRODUCTION BY THE COURT OF INFORMATION, TRANSCRIPTS AND DOCUMENTS IN THE CUSTODY OF RESIDENTS AND NON-RESIDENTS, *MOTION 17, DOCKET* 46 [*USA* v. *ARDT,* No. 80 CR 0739], U.S. District Court, Northern District of Illinois, Eastern Division).

Subsequent to this action, the Petitioner petitioned the COURT OF COMMON PLEAS, Franklin County, Columbus, Ohio (*ARDT* v. *HANSAN*, Director, Ohio Welfare Department, Case. No. 245648, *infra*), for an injunction against the Ohio Department of Public Welfare, prohibiting the suspension, which was granted, and ordered the scheduling of a judicial hearing as directed by the Ohio Court. The Ohio COURT OF COMMON PLEAS, *infra*, continued the injunction pending further investigation by the Ohio Department of Public Welfare.

Investigations by the Ohio State Welfare Department and Federal Agents continued in this and other areas for several years, including the ordering of a ten-year Internal Revenue Service audit of the Petitioner.

(Trial Court Record, MOTION FOR SERVICE OF SUBPOENA AND FOR PRODUCTION BY THE COURT OF INFORMATION, TRANSCRIPTS, AND DOCUMENTS IN THE CUSTODY OF RESIDENTS AND NON-RESIDENTS, *MOTION 17, DOCKET 46, supra*, p. 3 and p. 6, reference to subpoena to *CLERK OF COURT OF COMMON PLEAS*, Franklin County, Columbus, Ohio, *ARDT* v. *HANSAN*, Case No. 245648]; and,

*MOTION 17, DOCKET 46, supra*, p. 3 and p. 6, reference to subpoena to CLERK OF COURT OF COMMON PLEAS, Franklin County, Columbus, Ohio, [*ARDT* V. *HANSAN*, Appeal Case No. 72CV-09-2829]; and,

*MOTION 17, DOCKET 46, supra*, p. 4, with reference to subpoena to DIRECTOR, OHIO DEPT. OF PUBLIC WELFARE, 180 E. Broad St., Columbus, Ohio.)

The motion for service of subpoenas (to which motion was attached the original of all the subpoenas, together with a stamped and addressed envelope, lacking only the court's approval for service) for these witnesses in the Trial Court (as requested in Petitioner's Motion, Trial Court Record, MOTION 17, DOCKET 46, *supra*) was made on February 5, 1981, and

was continued to October 1, 1981, by the Trial Court, at which time the Trial Court denied assistance to the *forma pauperis* petitioner and set the case for trial a few weeks later, thereby effectively preventing access of Petitioner to the witnesses, since Petitioner did not have resources to pursue the matter further, contrary to *Griffin* v. *Illinois*, 351 US 12, 100 L Ed 891; 55 ALR 2d 1055; and *Washington* v. *Texas*, 388 US 14; 18 L Ed at 1019.

The actions of the Ohio State Department of Welfare, in suspending Petitioner's participation in the Welfare Program and in their refusal to honor their contractual obligations and pay substantial amounts owed and overdue, forced Petitioner here to petition for relief from the financial burdens imposed under the Rules of Bankruptcy, (Trial Court Record, *MOTION 17, DOCKET 46, supra*, page 6, with reference to subpoena to CLERK OF THE U.S. BANKRUPTCY COURT, SOUTHERN DISTRICT, EASTERN DIVISION, COLUMBUS, OHIO, [*EDWARD W. ARDT*, Case no. 57746], 1972).

On December 24, 1980, Petitioner was served with a Summons (Trial Court Record, *DOCKET 3, U.S.A.* v. *ARDT*, Case No. 80 CR 0739, *supra*), issued upon complaint of the United States Attorney for the Northern District of Illinois, Thomas P. Sullivan, charging informations of three separate counts—one count for each of the three years, 1974, 1975, and 1976, alleging that because Petitioner had approximate gross receipts for professional services rendered over $1,000.00, he was one required to file reports with the Commissioner of Internal Revenue Service, and that he therewith failed to file such reports in violation of 26 USC 7203.

The Trial Court, having on October 1, 1981, blocked the Petitioner's right to have witnesses and documents to defend himself, forced the Petitioner to go to trial on November 11, 1981. It is our contention that this procedure was a violation of Petitioner's right to a fair trial under Amendment Six, U.S. Constitution; and was also a denial of due process of law under Amendment Five, U.S. Constitution.

## REASONS FOR THE ALLOWANCE OF THE WRIT

This writ of certiorari is sought because the issues presented herein raise important questions of Federal Law and Constitutional guarantees under the Fifth and Sixth Amendments to the U. S. Constitution.

1. The United States Court of Appeals for the Seventh Circuit's judgment and opinion entered on December 1, 1982, overlooked and misapprehended the state of the record and the applicable law pertaining thereto; that the subject appeal is of exceptional importance, and that the Seventh Circuit Court's opinion is at variance with decisions of the U. S. Supreme Court and other Circuit Courts of Appeal.

2. The United States Court of Appeals for the Seventh Circuit's opinion is predicated upon *U. S.* v. *Verkuilen*, 690 F. 2d 648 (7th Circuit) which is in direct conflict with the case of *U. S.* v. *Schiff*, 612 F. 2d 73 (2nd Circuit) and the United States Supreme Court should clarify these cases to avoid conflict among the Circuit Courts of Appeal.

3. The petitioner's invocation of a Fifth Amendment priviledge on a Internal Revenue Tax Return during a period in which petitionee faced criminal charges is a proper matter for the Supreme Court to consider and rule upon, to define the parameters of self-incrimination protections of citizens of the United States.

4. The United States Court of Appeals for the Seventh Circuit did not address an indigent defendant's right to obtain witnesses on the defendant's behalf, particularly the ability to support the invocation of defendant's Fifth Amendment privilege based on concurrent criminal, quasicriminal and bankruptcy proceedings which might or could lead to additional criminal proceedings against the defendant. A ruling on the issue of the availability of court process to obtain necessary evidence for indigent defendants is necessary to the Circuit

Courts of Appeal and the District Courts of the United States to establish standards for the obtainment of critical evidence to support the defense of indigents in the Federal Courts.

5. The Seventh Circuit Court of Appeals overlooked and misapprehended the law on instructions tantamount to directions to find a defendant "guilty", thus depriving a criminal defendant of a trial by jury guaranteed to him under the Sixth Amendment of the U. S. Constitution. The Supreme Court of the United States must maintain a vigilance against incursions and depletions of constitutional guarantees as they develop in the lower courts.

6. The Seventh Circuit Court of Appeals overlooked and misapprehended the law on the requirement to show "willfulness" in prosecutions under 26 U.S.C. Section 7203 and, in so doing, imposed an improper standard which future cases may be ajudicated improperly, contrary to a constitutional interpretation of the Internal Revenue Code, a law or statute of the United States.

## ARGUMENT

### I. Petitioner Contends He Was Denied His Right to a Constitutional Jury Trial.

Petitioner contends that he failed to obtain a constitutional jury trial before the trial court; and that the Seventh Circuit Court of Appeals completely abdicated its duty on appeal and merely rubber stamped the trial court errors and showed its complete bias by referring to Petitioner as a "tax protester", when in fact Petitioner had been deprived of his right to obtain witnesses, in violation of Amendment Six, (U.S Constitution); and was completely denied his Fifth Amendment (U.S. Constitution) privilege by the trial court, which by its instruction directed the jury to find a guilty verdict, violating the holding in *U.S.* v. *Murdock, supra.*

First, consider the trial court's errors. In this case, the Petitioner, who was a practicing dentist in the State of Ohio, was suspended from taking welfare patients by the State of Ohio in an Administrative proceeding. This was accomplished without a court hearing, and it caused the Petitioner to be forced into bankruptcy. (U.S. Bankruptcy Court, *supra*)

The Petitioner later moved to the State of Illinois, and we contend, properly pled the Fifth Amendment on his tax returns.

It is the contention of this Petitioner on this state of facts that he had not only a right, but a duty, to get protection under the First Amendment to plead the Fifth Amendment and have the basic question of willful violation put to the jury under proper instruction.

The Trial Judge, Honorable Charles P. Kocoras, acted in violation of Petitioner's constitutional rights barring the Petitioner from asserting the Fifth Amendment, and held that although the Petitioner had complied with the rule of *U.S.* v. *Sullivan,* 274 US 259, 47 Sct 607, 71 LEd 1037 (1927), in

effect, he had filed no return at all. The instructions of the trial court were as follows:

Trial transcript, Nov. 12, 1981, 11 a.m., p. 264, L20-25 & p. 265, L1-2:

> "You must not question any rule of law stated by me in these instructions. Regardless of any opinion you may have as to what the law ought to be, you must base your verdict upon the law given by me.
>
> "It is your duty to determine the facts from the evidence in this case. You are to apply the law given to you in these instructions to the facts; and in this way, decide the case."

and on p. 271, L 2-16:

> "A good faith misunderstanding of the law may negate wilfullness. However, mere disagreement with the law does not constitute good faith misunderstanding of the law because it is the duty of all persons to obey the law whether or not they agree with it.
>
> "Also, a person's belief that the tax laws violate his constitutional rights does not constitute good faith misunderstanding of the law.
>
> "Furthermore, a person's disagreement with the Government's monetary system and policies does not constitute good faith misunderstanding of the law.
>
> "The Fourth and Fifth Amendment objections and the other constitutional objections made on Government Exhibits IRS 1 through IRS 4, are not valid objections as a matter of law."

These instructions in the instant case were clearly erroneous, in that they failed to recognize the fact that the Petitioner possessed a First Amendment right to legally exercise his Fifth Amendment Privilege, and thus had a right under *U.S. v. Sullivan, supra,* to claim the Fifth Amendment on his tax return, and all this bears directly on the jury question as to whether he willfully violated 26 USC 7203.

In the case of *U.S.* v. *Schiff, supra,* the Court of Appeals, Second Circuit, had before it a Title 26 USC 7203 alleged violation, and handled the Fifth Amendment privilege by putting the matter to the jury under instruction, instead of holding an evidentiary hearing. In the instant case, the Trial Court added insult to injury by refusing to conduct a judicial hearing on pre-trial, in appearance of November 9, 1981. At that time, the transcript proves the following occurred:

Court Tr. (Pre-trial) Nov. 9, 1981, p. 10, L8-p. 12, L11:

"THE COURT: Mr. Ardt, you have asserted in response to information called for on income tax returns, as I indicated among other things, your privilege against self-incrimination. In a way I may describe it in a blanket sort of way: You refused to supply information to the Internal Revenue Service with respect to your income and deductions.

"If you would like you may offer at this time some basis for the assertions of that privilege as well as any other privileges that you rely on in not supplying information to the Internal Revenue Service.

"MR. ARDT: Your Honor, the Fifth Amendment of the Constitution guarantees me the right against self-incrimination, and the information that would be contained on those forms could be used in some way at some point in time, in some manner, to form a link in a chain of events which could tend to incriminate me in a criminal proceeding.

"THE COURT: Are you talking about any information called for on any income tax return?

MR. ARDT: I realize I have answered those questions individually, and with respect to taking the Fifth Amendment, I have addressed myself to the individual questions on there. The ones I have addressed myself to on that or answered in that manner, taking the Fifth Amendment, I do believe would apply to that, your Honor.

"THE COURT: Very well.

> "I find that the assertion of the Fifth Amendment privilege on these returns is a general and blanket one as reflected on the documents, as well as reflected on the expressions by Mr. Ardt in response to my inquiry. And on that basis *I find as a matter of law that the assertion is not a proper one,* and I think as a matter of law, ultimately I will have to instruct the jury that the documents themselves do not constitute an income tax return for purposes of the Internal Revenue statutes which are involved in this case. . . (emphasis added)
>
> "THE COURT: *Your motion for a judicial hearing is denied, Dr. Ardt.* Let's go on to another point." (emphasis added)

Thus, the trial court not only blocked a hearing on the Petitioner's Fifth Amendment privilege, but later refused to cover the matter by instruction to the jury on wilfullness, as was done in the *U.S.* v. *Schiff* case. This refusal constitutes gross reversible error.

Schiff's counsel on appeal made an extensive argument for an evidentiary hearing, but was overruled by the Second Circuit Court of Appeals. The factual situation in the *Schiff* case, Supra, differed in that Schiff claimed he had done nothing wrong which he had reason to conceal. But, in this case, Petitioner here claims the charges of criminal Fraud by the Ohio State Welfare Department and their subsequent illegal and unconstitutional action of suspension without due process, resulted in Petitioner being forced to file bankruptcy, which gave him a more than adequate reason to plead the Fifth Amendment. This bankruptcy lasted from 1972, over four years, into 1976; and it was during these years Petitioner was charged with failure to file tax returns. Thus, there is a serious question whether Internal Revenue Service could claim he had a duty to file while all his assets were under court order in the Bankruptcy Proceedings. The Trial Court was in error in assuming it could possibly have had jurisdiction of the present action during those years. The duty to file a tax return is on the Trustee. 9 Am Jur 2nd, 711 Section 434, Bankruptcy.

In additional compounding of the error, the Trial Court instructed the jury that the Petitioner's 1040 returns, Internal Revenue Service Exhibits, IRS I through IRS 4, (Trial Court Record) did not constitute returns as a matter of law. This clearly stripped the jury of all power to determine whether there was a willful violation under 26 USC 7203.

Thus, in the *Schiff* case, *supra*, Judge Daly charged the jury as follows: (See *U.S.* v. *Schiff*, 612 Fed 2d 73 at 78, note 6.)

> "Even if you find that the defendant erroneously claimed his Fifth Amendment privilege, his conduct is not willful if you find that he acted in accordance with a good faith understanding of the law based upon, among other things, a good faith reliance on judicial decisions of the federal courts or a good faith belief that the documents filed for the taxable years 1974 and 1975 constituted in each case an income tax return. The defendant's views need not be legally correct, just as long as he honestly believed and acted upon them in good faith."

In this case under similar facts, the trial court refused to make the following charge:

> "No one is required to answer any question on his tax return that may tend to incriminate him. If you believe that the information sought on the defendant's tax return might incriminate him, or that the defendant had a good faith belief that the information requested would tend to incriminate him, then you should find him not guilty.
>
> "Furthermore, if you find that the government has failed to prove beyond a reasonable doubt that the defendant did not have a good faith belief that the information sought would tend to incriminate him, then you should find him not guilty, since the government has the burden of proof on this issue." (Refused Defendant's Jury Instructions, No. 8, Trial Court Record.)

We contend the trial court should have instructed the jury as requested in Petitioner's Requested Jury Instruction No. 8, Supra, and included this instruction on good faith as Judge

Daly did in the *Schiff, supra,* case. Nowhere did this judge cover the meaning of the term willful, as used in the Statute, 26 USC 7203, and that it was reversible error not to do so.

Petitioner further contends that the trial court in this case, by failing to give the jury a proper instruction as to the meaning of the term "willful" in the statute, in effect, denied this Petitioner's right to a jury trial. This court, in the case of *Duncan* v. *Louisiana,* 391 U.S. 145, dealt at length with the question of whether a jury trial was necessary in a similar case where the offense of assault and battery was involved; and in that case, this court held that where a jail sentence of six months or more was involved, the defendant has a full right to a jury trial.

The Petitioner in this case has not had that right because the trial court, under the instructions given, held as a matter of law, no return was made, prevented this Petitioner from invoking the Fifth Amendment privilege and was automatically guilty merely by reason of the fact that he filed a return in which he attempted to invoke the Fourth and Fifth Amendments as to each question on the 1040 Internal Revenue Service form. Hence, our contention is that the jury trial allegedly given this Petitioner in this case was a mere sham and cannot meet the test laid down by this court in the case of *Duncan* v. *Louisiana, supra.*

Thus, the trial court here, we contend, nullified the right of the jury to pass upon the question of "willfulness" under 26 USC 7203; and just as effectively denied this Petitioner his right to the jury, as the legislation did in the Louisiana statute which omitted the right to impanel a jury in an assault case.

In this connection, it is our further contention that the procedure followed by the trial court violated the ruling of this court in the case of *U.S.* v. *Murdock, supra,* where the trial court instructed the jury that the Defendant was guilty beyond a reasonable doubt.

Colonial history covering the origin of the Fifth Amendment privilege supports our contention that the learned trial judge was in error in refusing to grant an evidentiary hearing requested by the Petitioner and compounded his error by refusing to place the entire matter of willfulness before the jury by proper matter of instruction, and Petitioner contends that the trial judge in effect directed the jury to find that the Petitioner was willful merely by invoking the Fifth Amendment privilege pursuant to the case of *United States* v. *Sullivan, supra.*

Finally, the court, by its conduct of the trial and refusal to cover the Fifth Amendment privilege as it was related to the element of willfulness, violated the ruling in *U.S.* v. *Murdock, supra;* and completely overlooked the historical origin of the rule against self-incrimination as set forth in *21 Virginia Law Review,* p. 781 at 782:

> "Before these trials, Cotton Mather instructed one of the judges in the technic of procuring confessions as follows:
>
> " 'Now first a credible confession of the guilty wretches is one of the most hopefull wayes of coming at them* * *I am farr from urging the Un-English method of torture* * *but whatever hath a tendency to put the witches into confusion is likely to bring unto confession. * * * Here Cross & Swift Questions have their use.'
>
> " 'Crosse & Swift Questions' was the method used at first, and it soon degenerated into the 'unEnglish method of torture'."

**II. Petitioner Contends the Court of Appeals Seventh Circuit, Manifests a Bias and Prejudice in its Order Which Petitioner Further Contends That, in Effect Denies Him His Constitutional Rights**

In the introduction of the Seventh Circuit Court of Appeals to its Order without formal Opinion, that court manifests a bias and prejudice against the Petitioner, which is reprehensible and should not be tolerated by this court. They said:

> "He (Petitioner) is currently a 'tax protester', however, who refuses to file properly completed income tax returns for the years 1974, 1975 and 1976." (See Appendix A)

The court goes on to admit the Petitioner registered an objection to questions of the Fourth and Fifth Amendments, U.S. Constitution.

It is our contention that the Seventh Circuit Court of Appeals manifested a bias and abused the Petitioner's First Amendment Rights under the United States Constitution by using a term of opprobrium loosely, without defining; as though the Petitioner, a good, well-educated citizen, was a criminal. This court said, in the case of *Abood* v. *Detroit Board of Education,* 431 US 209, 52 L Ed 2d 261, 97 S.Ct. 1782:

> "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. E.g., *Elrod v Burns,* 427 US 347, 355-357, 49 L Ed 2d 547, 96 S Ct 2673 (plurality opinion); *Cousins v. Wigoda,* 419 US 477, 487, 42 L Ed 2d 595, 95 S Ct 541; *Kusper v Pontikes,* 414 US 51, 56-57, 38 L Ed 2d 260, 94 S Ct 303; *NAACP v Alabama ex rel. Patterson,* 357 US 499, 460-461, 2 L Ed 2d 1488, 78 S Ct 1163."

If teachers have a right to organize to advance their welfare (as in *Abood, supra*), why can't taxpayers organize to invoke a well-settled constitutional privilege not to testify and be a witness incriminating themselves?

With due respect to the Trial Court, we contend the Court conducted a trial in which the Court denied the Petitioner access to all witnesses, (in violation of Amendment Six, U.S. Constitution), and refused to subpoena a bankruptcy file (Trial Court Record, *MOTION 17, DOCKET 46*, p. 3 and p. 6, U.S. Bankruptcy Court, *supra*), (which bankruptcy of Petitioner was pending in all the years 1972 through 1976 upon which the government claims tax returns should have been filed); and the Court gave to the Jury what amounted to a directed conviction, depriving the Petitioner of his Fifth Amendment privilege; with the end result that the Court became a modern version and counterpart of Judge Jeffries in charge of the infamous Court of Star Chamber—but, all this was done without benefit of the Statute of 1540 authorizing such penal procedure.

Courts of Star Chamber operated in England from 1450, and in 1540 were sanctioned by Act of Parliament. They dispensed with a jury in all noncapital offenses. It gave the King's Proclamation the force of law. Jurisdiction was practically unlimited and included all noncapital offenses and even included treason. Parliament abolished Star Chamber in 1641.

The Seventh Circuit Court of Appeals ignored the intent and purpose of *Amendment Six*, U.S. Constitution, which states defendant in all criminal prosecutions shall "have compulsory process for obtaining witnesses in his favor." This court in *Washington* v. *Texas, supra,* at 1019, stated:

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies."

The Seventh Circuit Court of Appeals in its Order of December 1, 1982, (see Appendix A), dealing with the Petitioner's attempt to subpoena witnesses states:

> "Ardt's only showing of financial inability to pay witness fees was the submission of a '*Special Affidavit of Impecu-*

*niosity'* disclosing that his expenses nearly exceeded his income and that he owned no unencumbered real estate."

This statement of the Seventh Circuit Court of Appeals is false and conveniently overlooks the fact that the Petitioner was in bankruptcy for four years from 1972 through 1976.

The record on appeal, including motion to subpoena bankruptcy proceedings from the Clerk of U.S. BANKRUPTCY COURT, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION, Columbus, Ohio, (Trial Court Record, *MOTION 17, DOCKET 46, supra,* p. 3), *proves that this statement is false.* The Bankruptcy Proceeding No. 57746 was filed on June 7, 1972, and was not closed until June 22, 1976.

During this period the Internal Revenue Service took $3627.45 of Dr. Ardt's meager assets, and then had the unmitigated gall to claim in this case that they do not recall it, and deny him the right to invoke the Fifth Amendment privilege.

FINALLY, this Court, in a series of decisions involving various underworld characters and subversives, has allowed defendants, under similar compulsions to this Petitioner, to plead the Fifth Amendment Privilege against self-incrimination. See: *Malloy* v. *Hogan,* 378 US 1; 84, S Ct 1489; *Albertson* v. *SAC Bd.,* 382 US 70; 86 S Ct 194; *Marchetti* v. *U.S.,* 390 US 39, 88 S. Ct. 697, 19 L Ed 2nd, 889; *Grosso* v. *U.S.,* 390 US 62; 88 S Ct 709, 19 L Ed 2nd, 906.

Under the prevailing law, there is no apparent justification of the Trial Court and the Court of Appeals (Seventh Circuit) for refusing the Fifth Amendment Privilege to this Petitioner, who was in the process of a bankruptcy proceeding for all the years in question. (*Amendment Five,* U.S. Constitution).

## CONCLUSIONS

**Thus, Petitioner has demonstrated to this Court:**

A. That the Trial Court prevented the Petitioner from obtaining witnesses necessary to his defense in violation of Amendment Six, U.S. Constitution, and this violation of his rights included the bankruptcy files located in Franklin County, Ohio, which would have proven that the Petitioner was innocent of all the present charges;

B. That the Writ of Certiorari should be granted on the ground that this case is a direct and opposite holding on a very important question of law and is in direct conflict with the holding of the Second Circuit Court of Appeals in the case of *United States* v. *Schiff, supra;*

C. That Petitioner's constitutional rights under the due process of law clause, Amendment Five, U.S. Constitution were violated; that the Trial Court did not give this Petitioner a jury trial in a constitutional sense as required in the case of *Duncan* v. *Louisiana, supra,* and *Washington* v. *Texas, supra.*

Respectfully submitted,

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*Attorney for Petitioner*

# APPENDIX

## APPENDIX A
**Unpublished Per Curiam Order**

Judgment—Oral Argument

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

December 1, 1982

Before
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOHN MINOR WISDOM, Senior Circuit Judge*

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. EDWARD WILLIAM ARDT, *Defendant-Appellant.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division |
| No. 82-1152 | No. 80 CR 739 |
| | Charles P. Kocoras, Judge |

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the order of this Court entered this date.

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* Honorable John Minor Wisdom, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(Argued October 27, 1982)

UNPUBLISHED ORD
NOT TO BE CITED
PER CIRCUIT RULE

December 1, 1982

Before
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOHN MINOR WISDOM, Senior Circuit Judge*

UNITED STATES OF AMERICA
*Plaintiff-Appellee,*

No. 82-1152 *v.*

EDWARD WILLIAM ARDT
*Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois.

No. 80 CR 739

Charles P. Kocoras, Judge.

## ORDER

This case presents substantially the same issues this Court recently confronted in *United States* v. *Verkuilen*, No. 80-2082 (7th Cir. October 6, 1982). The defendant-appellant, Edward William Ardt, is a dentist who for many years had a successful practice and earned substantial income. He is currently a "tax protester", however, who refuses to file properly completed income tax returns for the years 1974, 1975 and 1976. Instead of submitting a completed Form 1040 for each of these years, he filed only portions of the required documents, and responded to all I.R.S. questions, including those concerning his social security number and occupation, by simply writing "Objection, Fourth and Fifth Amendments." Ardt was charged in a three count information with failing to file income tax returns in violation of 26 U.S.C. § 7203, and was convicted by a jury on all counts. We affirm.

---

* Honorable John Minor Wisdom, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

I.

Ardt first argues that the district court abused its discretion when it denied his motion for the service of seventy-eight subpoenas at government expense. He contends that *Washington* v. *Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967), guarantees a defendant the right to have compulsory process to establish a defense. Because he was unable to call the witnesses of his choice, Ardt asserts that he was denied due process of law and his Sixth Amendment rights.

Rule 17(b) of the Federal Rules of Criminal Procedure requires that a subpoena issue "upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense." The burden of making the showing in the first instance is on the defendant. *United States* v. *Micklus,* 581 F.2d 612, 616 (7th Cir. 1978). Here the defendant has failed to shoulder the burden Rule 17(b) imposes upon him. Ardt's only showing of financial inability to pay witness fees was the submission of a "Special Affidavit of Impecuniosity," disclosing that his expenses nearly exceeded his income and that he owned no unencumbered real estate. Neither fact is inconsistent with his ability to pay his income tax. The burden was on the defendant to demonstrate financial inability, and he was not relieved of that burden by invoking the Fifth Amendment. *See United States* v. *Peister,* 631 F.2d 658, 662 (10th Cir. 1980), *cert. denied,* 449 U.S. 1126, 101 S.Ct. 945, 67 L.Ed.2d 113.

The defendant also failed to demonstrate the necessity of the seventy-eight subpoenas. As this Court stated in *United States* v. *Verkuilen, supra,* slip op. at 17, when "[t]he record before us is devoid of any factual showing that the testimony of the defense witnesses for whom the district court refused subpoenas would have been relevant and material to the defense . . ., [t]he court . . . [is] within its discretion in denying defense requests . . ." We hold, therefore, that the trial court did not abuse its discretion in denying Ardt's motions.

## II.

The defendant next argues that the district court erred when it refused to give a jury instruction concerning his good-faith assertion of the Fifth Amendment. The relevant part of Ardt's proposed instruction, the rejection of which he now claims was error, is as follows:

> Furthermore, if you find that the government has failed to prove beyond a reasonable doubt that the defendant did not have a good faith belief that the information sought would tend to incriminate him, then you should find him not guilty, since the government has the burden of proof on this issue.

The defendant's argument is contrary to the holdings of both the Supreme Court and this circuit, and must be rejected. In *United States* v. *Pomponio*, 429 U.S. 10, 12-13, 97 S.Ct. 22, 50 L.Ed.2d 12, 16 (1976), *rehearing denied*, 429 U.S. 987, 97 S.Ct. 510, 50 L.Ed.2d 600 (1976), the Court held that the proper definition of willfulness in a prosecution for wilfully filing false income tax returns is "a voluntary, intentional violation of a known legal duty .... An additional instruction on good faith [is] unnecessary." (citations omitted). This Court has consistently endorsed the *Pomponio* instruction in § 7203 cases. *See United States* v. *Verkuilen, supra*, slip op. at 9-10; *United States* v. *Moore*, 627 F.2d 830, 833 (7th Cir. 1980), *cert. denied*, 450 U.S. 916, 101 S.Ct. 1360, 67 L.Ed.2d 342 (1981); *United States* v. *Sawyer*, 607 F.2d 1190, 1192 (7th Cir. 1979), *cert. denied*, 455 U.S. 943, 100 S.Ct. 1338, 63 L.Ed.2d 776 (1980). Because the trial judge gave the approved instruction in this case, no additional good-faith instruction was called for.

## III.

Ardt also argues that the trial court abused its discretion when it refused to admit into evidence the entire transcript of a tape-recorded conversation between himself and an I.R.S. agent. He asserts that the portion of the conversation not admitted was material to his Fifth Amendment defense.

We cannot accept the defendant's contention. In the absence of a showing of relevancy, a trial judge does not commit reversible error when he refuses to admit evidence. Faced with a defendant who repeatedly refused to explain his trial strategy or his theory of the defense, the district court in this case was well within its discretion in refusing to admit the entire two-hour-long transcript. Moreover, because Ardt never directed the trial judge's attention to that portion of the conversation he now maintains was relevant to his Fifth Amendment defense, the theory is being raised for the first time on appeal and must be rejected. *United States v. Winagrad*, 656 F.2d 279, 284 (7th Cir. 1981), *cert. denied sub nom., Siegel v. United States*, ____ U.S. ____, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982); *Laketon Asphalt Ref. v. U.S. Dept. of Int.*, 624 F.2d 784, 788 (7th Cir. 1980).

## IV.

We have reviewed the defendant's numerous other contentions and find them to be without merit. Accordingly, the judgment of the district court is AFFIRMED.

## APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

March 8, 1983

Before
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOHN MINOR WISDOM, Senior Circuit Judge*

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*Plaintiff-Appellee,*<br>*vs.*<br>No. 82-1152<br>EDWARD WILLIAM ARDT,<br>*Defendant-Appellant.* | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division<br>No. 80 CR 739<br>Charles P. Kocoras, Judge |

### ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendant-Appellant Edward William Ardt, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Honorable John Minor Wisdom, Senior Circuit Judge for the Fifth Circuit, sitting by designation.

## APPENDIX C

DOCKETED
JAN 22 1982

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA

*vs.* No. 80 Cr 739-1

EDWARD W. ARDT
*Defendant.*

## JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date—01-19-82.

☐ WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

UNSEL

☒ WITH SPECIAL ADVISOR DAVID BORTMAN
*(Name of counsel)*

EA

☐ GUILTY, and the court being satisfied that there is a factual basis for the plea.

☐ NOLO CONTENDERE,

☒ NOT GUILTY

There being a verdict of { ☐ NOT GUILTY. Defendant is discharged ☒ GUILTY.

DING & GMENT

Defendant has been convicted as charged of the offense( s ) of knowingly, willfully nad unlawfully failing to make and file federal incomtax returns in violation of 26 USC 7203 on Counts 1, 2 and 3 of the information

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause

to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) Year on Count 1 of the information.

**SENTENCE OR PROBATION ORDER**

IT IS ADJUDGED that on Count 2 of the information, the defendant pay a fine to the United States in the sum of $10,000. and the imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of FIVE (5) Years.

Imposition of sentence on Count 3 of the information is hereby suspended and the defendant is placed on probation for a period of FIVE (5) Years. Such period of probation to be consecutive to the term of imprisonment imposed on Count 1 and concurrent to probation imposed on Count 2, and on the following terms and conditions:

**SPECIAL CONDITIONS OF PROBATION**

1. That he obey all local, state and federal laws;
2. That he file all income tax returns and pay all taxes, penalties, and interest; and
3. That he comply with the rules and regulations of the probation office and cooperate with them in all matters.

**ADDITIONAL CONDITIONS OF PROBATION**

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

COMMITMENT RECOMMENDATION

/s/ CHARLES P. KOCORAS
Charles P. Kocoras
*U.S. District Judge*
Date January 21, 1982

## APPENDIX D

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

*First Amendment* To the United States Constitution

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Fourth Amendment* To the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Fifth Amendment* To the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, * * *.

*Sixth Amendment* To the Constitution of the United States

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

*26 U.S. Code, Section 7203* "WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION OR PAY TAX."

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015) keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and upon conviction thereof, shall be fined nor more than $10,000 or imprisoned not more than one year, or both, together with the cost of prosecution."